United States Court of Appeals

for the Second Circuit

PETITIONER'S BRIEF

75-4021

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P/S

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

NATIONAL ASSOCIATION OF INDEPENDENT TELEVISION
PRODUCERS & DISTRIBUTORS, NO. 75-4021
WARNER BROS., ET AL., NO. 75-4024
SANDY FRANK PROGRAM SALES, INC., NO. 75-4025
WESTINGHOUSE BROADCASTING COMPANY, INC., NO. 75-4026
CBS INC., NO. 75-4036

Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION and
UNITED STATES OF AMERICA,

Respondents,

AMERICAN BROADCASTING COMPANIES, INC.,
CBS INC.,
NATIONAL BROADCASTING COMPANY, INC.,
WARNER BROS., INC.,
WESTINGHOUSE BROADCASTING COMPANY, INC.,

Intervenors.

ON PETITIONS FOR REVIEW OF AN ORDER OF
THE FEDERAL COMMUNICATIONS COMMISSION

BRIEF FOR PETITIONER AND INTERVENOR CBS INC.

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February 21, 1975

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BRIEF OF
PETITIONER AND INTERVENOR CBS INC.

ISSUE PRESENTED FOR REVIEW

Whether the Order of the Commission under review adopting amendments to the prime time access rule constitutes an intrusion by the Commission into the regulation of program content impermissible under the First Amendment and the Communications Act.

REFERENCE TO RULINGS

The Order of the Federal Communications Commission ("Commission") under review in this proceeding is set forth in a Second Report and Order: In the Matter of Consideration of the Operation of, and Possible Changes in, the Prime Time Access Rule, § 73.658(k) of the Commission's Rules, FCC No. 75-67, released January 17, 1975 (hereinafter "Second Report and Order"). This Court has reviewed prior versions of § 73.658(k) of the Commission's Rules in Mt. Mansfield Television, Inc. v. FCC, 442 F.2d 470 (2d Cir. 1971), and National Association of Independent Television Producers and Distributors v. FCC, 502 F.2d 249 (2d Cir. 1974) (hereinafter "NAITPD v. FCC"). Pursuant to an Order of this Court of February 13, 1975 the Petition for Review of CBS Inc. ("CBS") has been consolidated with all other petitions for review of the Commission's Second Report and Order.[1/]

STATEMENT OF THE CASE

In the Second Report and Order here under review, the Commission has adopted a third version of the

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1/ On February 13, 1975, CBS was granted leave to intervene in the Petition for Review of the Second Report and Order filed in this Court by National Association of Independent Television Producers on January 30, 1975 (No. 75-4021).

prime time access rule (hereinafter "PTAR III"), scheduled to become effective in September 1975. The background of this proceeding is set forth in some detail in the Second Report and Order, and in this Court's opinions in Mt. Mansfield Television, Inc. v. FCC, 442 F.2d 470 (2d Cir. 1971), and NAITPD v. FCC, 502 F.2d 249 (2d Cir. 1974). To the extent relevant to the issues under review, the background of PTAR III will be discussed in the argument that follows.

ARGUMENT

THE ORDER UNDER REVIEW CONSTITUTES A REGULATION OF PROGRAM CONTENT AND AN INTRUSION INTO THE OPERATIONS OF BROADCASTERS INCONSISTENT WITH THE FIRST AMENDMENT AND THE COMMUNICATIONS ACT.

Introduction

In Mt. Mansfield Television, Inc. v. FCC, 442 F.2d 470 (2d Cir. 1971), this Court held that the prime time access rule adopted by the Commission on May 4, 1970 (hereinafter "PTAR I")[2/] did not contravene the First Amendment. This proceeding involves questions as to the constitutionality of the Second Report and Order adopted by the Commission on January 17, 1975, creating certain exemptions to the rule for "children, public affairs or documentary programs."

While the Commission apparently views Mt. Mansfield as dispositive of the constitutionality of the present rule,[3/] this is plainly not the case. Although a governmental agency may have the power to prohibit entirely certain conduct, it is well established that this power of prohibition does not permit the government, by

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2/ Report and Order: In the Matter of Network Television Broadcasting, 23 F.C.C.2d 382 (1970) (hereinafter "Network Television Broadcasting"), modified in part on reconsideration, 25 F.C.C.2d 318 (1970).

3/ Second Report and Order, ¶¶ 44, 45.

way of exemption, to engage in the regulation of the content of speech, or otherwise to invade rights protected by the First Amendment. Police Department of the City of Chicago v. Mosley, 408 U.S. 94 (1972).[4/]

In the argument that follows, we will show that the exemptions adopted by the Commission in its Second Report and Order constitute a regulation of program content impermissible under the First Amendment. Indeed, in sharp contrast to PTAR I, PTAR III constitutes an attempt to regulate the content of programming according to the Commission's idiosyncratic view of public needs -- not only by establishing general categories of preferred program content but also by creating a system whereby both individual programs and the extent to which individual broadcasters present certain types of programs will be closely monitored and evaluated in the light of the Commission's day-to-day interpretations of its own ill-defined standards and the "spirit" of this rule.

It is precisely this type of regulation of program content which this Court indicated was not at issue in Mt. Mansfield and which is plainly invalid under the First Amendment.

4/ See also Sherbert v. Verner, 374 U.S. 398, 404 (1963): "It is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing conditions upon a benefit or privilege"; Speiser v. Randall, 357 U.S. 513 (1958).

I. The Order Under Review Constitutes An Extreme Assertion By The Commission Of The Power To Control Program Content.

As the Second Report and Order under review indicates, PTAR III represents in large part a distillation of the Commission's experience and dissatisfaction with PTAR I and the ad hoc approach to administration of the rule. Thus, the scope and effect of PTAR III, in terms of its effect on the regulation of program content, must be understood and assessed in light of PTAR I, the administration of that rule, and the Second Report and Order promulgating PTAR III.

By its basic terms, PTAR I prohibited licensees in the top 50 television markets from broadcasting network programs, "off-network" programs,[5/] and feature films broadcast by another station in the same market in the previous two years for more than three out of the four prime time hours.[6/] Programming during the "access" hour was to be derived from other sources. The only exceptions as to network programs involved situations where the timing of the broadcasts was not in the network's power to control: namely, "special news programs

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5/ "Off-network program" means programs which have previously been exhibited as network programs.

6/ Defined at 7:00 p.m. - 11:00 p.m. Eastern and Pacific Time 6:00 p.m. - 10:00 p.m. Central and Mountain Time.

dealing with fast-breaking news events, on-the-spot coverage of news events, and political broadcasts by legally qualified candidates for public office."[7/] Recognizing that the anticipated results of the rule were necessarily speculative, the Commission specified that the proceeding was not terminated and that the Commission would continue to study the effects of the rule and "make such adjustments in our rules as experience may indicate are in the public interest." 23 F.C.C.2d at 401.

While an underlying Commission purpose of PTAR I was to promote the production and broadcast of more first-run syndicated programming during prime time,[8/] the Commission, in adopting PTAR I, was careful to emphasize that

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7/ In its order promulgating PTAR I the Commission also indicated that it would consider waivers of the rule for certain live sports events, which unexpectedly and for reasons beyond the network's control run longer than anticipated, and for regularly scheduled network news broadcasts when preceded by an hour of local news broadcasts, in order to provide flexibility in licensee scheduling and avoid an otherwise artificial disruption of licensee's local news broadcasts. Network Television Broadcasting, 23 F.C.C.2d at 395, nn. 35, 36. The Commission later indicated that it would also consider waivers for all one-time news and public affairs broadcasts not part of a regularly scheduled series, in part because of the necessity for flexibility in performing an important journalist function. Prime Time Access Rule, 32 F.C.C.2d 55 (1971).

8/ See Network Television Broadcasting, 23 F.C.C. at 394, 395.

> "it is not our objective or intention to smooth the path for existing syndicators or promote the production of any particular type of program -- whether or not it be included within the present category of quality high cost programs. The types and cost levels of programs which will develop from opening up evening time must be the result of the competition which will develop among present and potential producers seeking to sell programs to television broadcasters and advertisers." (Emphasis supplied.) Network Television Broadcasting, 23 F.C.C.2d at 397.

In upholding PTAR I in Mt. Mansfield Television, this Court rejected a claim that, by reducing the program choices available to licensees, the rule violated the First Amendment and the anti-censorship provisions of the Communications Act. The Court emphasized the content-neutral features of the rule, and said:

> "[T]he challenged regulations are not an exercise of censorship powers. The Commission has found that the wide range of choice theoretically available to licensees is either not in fact available or is not being exercised for economic reasons . . . . The Commission does not dictate to the networks or the licensees, or the independent producers whom it hopes to stimulate, what they may broadcast or what they may not broadcast; it is merely ordering licensees to give others the opportunity to broadcast." (Emphasis supplied.) 442 F.2d at 480.

Moreover, the Court rejected as "speculative" the argument that the effect of the rule would be to reduce the

amount of controversial issue programming and, quoting the Supreme Court in Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 393 (1969), said

> "'[I]f experience with the administration of these doctrines indicates that they have the net effect of reducing rather than enhancing the volume and quality of coverage, there will be time enough to reconsider the constitutional implications.'" 442 F.2d at 479. 9/

The Commission began to depart from its position of neutrality with respect to program content soon after the adoption of PTAR I, when it was faced with numerous petitions for waiver of the prime time access rule. In acting on these petitions, whether they were ultimately granted or denied, the Commission began to consider program content and program quality as factors relevant to its decision, thus making plain the Commission's determination to favor programming it deemed desirable.

9/ Three years later, in NAITPD v. FCC, 502 F.2d 249 (2d Cir. 1974), this Court remanded PTAR II (described at p. 15, infra, n.15/) for reconsideration of the effective date established for the revised rule and invited further consideration by the Commission of certain policy issues raised by the petitions. While the Court did not address the merits of the revised rule, it reiterated what it had said in Mt. Mansfield:

> "[In Mt. Mansfield] we recognized the experimental nature of the rule and warned that our holding did not preclude a further review of experience with the rule if it proved to be inimical to the public interest." 502 F.2d at 252.

For example, as early as October 1971, the Commission denied a general waiver request by ABC and NBC to cover live broadcasts of the 1972 Olympic Games but cited as a factor in favor of the waiver that "the presentation of substantial Olympic coverage appears to be desirable and in the public interest." Prime Time Access Rule, 32 F.C.C.2d 58, 62 (1971).[10/] Also, while initially denying NBC's request for waivers to cover the Academy Awards and Miss America contests, the Commission later granted these waivers because of "the very exceptional and special nature of these programs." Request by National Broadcasting Company, 33 F.C.C.2d 743, 744 (1972).

In February 1972 the Commission granted a waiver application to permit off-network broadcasts of "Wild Kingdom" (an animal series previously presented on NBC) during the access period on the representation of the program owner that 12 of the yearly 52 programs would be new productions. While disclaiming principal reliance on the merits of the program, the Commission conceded that its action was based to a "certain extent" on the petitioner's representations of the program's quality, educational merit, and "timeless interest." Petition of Mutual Insurance Co. of Omaha, 33 F.C.C.2d 583, 584, 585 (1972).

10/ See also Request of American Broadcasting Cos., Inc., 35 F.C.C.2d 320, 765 (1972).

In July 1972 the Commission denied a waiver request for off-network broadcasts of the "National Geographic" programs (a nature series previously presented on CBS). The petitioner had represented that approximately the same proportion of new programs to old programs as "Wild Kingdom" would be produced. Other than expressing a need to "restrict waiver grants to the bare minimum," the Commission provided little basis for distinguishing this case from its action on "Wild Kingdom." Request of Storer Broadcasting Company, 35 F.C.C.2d 889, 890 (1972). Then, on petition for reconsideration, the Commission decided to grant the waiver in view of "the distinctive (and meritorious) character of the material involved, a factual presentation of nature and wildlife. . . ." Prime Time Access Rule, 37 F.C.C.2d 933, 936 (1972).

In Request of Campbell Soup Company, 35 F.C.C.2d 758 (1972), the Commission denied a waiver request for off-network broadcasts of "Lassie," notwithstanding the representations concerning the program's educational and ethical value, substantial following, and numerous awards, and the petitioner's undertaking to produce a larger proportion of new programs than was promised for "Wild Kingdom." The Commission denied the request primarily on the

grounds that, unlike "Wild Kingdom," "Lassie" was "fictionalized entertainment." 35 F.C.C.2d at 760.

Three weeks later, however, the Commission granted a waiver for the off-network series "Six Wives of Henry VIII" on the grounds that the programs constituted a "distinctive and meritorious series." Petition of Time-Life Films, 35 F.C.C.2d 773 (1972). Recognizing the apparent anomaly with its decision on "Lassie," the Commission stated that "we believe that the program here falls into a different class and warrants different treatment." 35 F.C.C.2d at 774.

These decisions, which are merely illustrative of the Commission's ad hoc rulings under PTAR I, 11/ represent an unparalleled intrusion of the Commission into

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11/ See also, e.g., the following Prime Time Access Rule actions: 32 F.C.C.2d 867 (1971) (waiver for children's program "Cinderella" granted in view of "special character" of the program); 33 F.C.C.2d 828 (1972) (waiver for "Look Homeward Angel" granted in view of "special character" of the program); 33 F.C.C.2d 949 (1972) (waiver for "Winnie the Pooh" granted in view of "the special character of the programming involved"); 35 F.C.C. 770 (1972) (waiver for political party telethon granted in view of "the unusual nature of the programming involved"); 43 F.C.C.2d 459 (1973) (waiver not granted for "Animal World" in absence of "special circumstances" to justify waiver); 43 F.C.C.2d 462 (1973) (waiver for series "America" granted in view of "character" of program); Prime Time Access Rule Waivers, 31 Pike & Fischer R.R.2d 409, 418 (1974) (waiver for "Famous Adventures of Mr. Magoo" not granted in view of the uncertain future of the rule).

the content of programming. In effect, they have converted the Commission into a television program-licensing board -- which has substituted its views for professional judgments and audience interest -- whose virtually unlimited and arbitrary discretion has been largely beyond judicial review.[12/] Indeed, the intrusion into program content and the seemingly arbitrary application of the Commission's judgments in this area prompted then-Chairman Burch to charge that his colleagues were simply engaged in "making . . . back-handed qualitative programming judgment[s] which, in my view, lies wholly beyond their authority" and that

> "Commission action in this area is becoming a floating crap game, whose outcome is both arbitrary and capricious; and worse, it is hip-deep into what can only be labeled programming judgments." 35 F.C.C.2d at 761, 767. 13/

12/ So far as we know, only one waiver action has been appealed to date and that related to a waiver petition for the off-network series, "America," which was granted in view of the "character" of the series and its comparability to "Six Wives of Henry VIII." Prime Time Access Rule, 43 F.C.C.2d 462 (1973). A petition for review was filed in the United States Court of Appeals for the District of Columbia Circuit in November 1973 by the National Association of Independent Television Producers and Distributors (D.C. Cir. No. 73-2052). Although the court ordered expedited consideration, no decision has yet been rendered.

13/ See also dissent of then-Commissioner Bartley regarding waiver for "Six Wives of Henry VIII," where he said:

(Footnote continued on page 14)

Essentially, PTAR III, like PTAR I, limits network and off-network programming during prime time to three hours. The principal modification of the original rule in PTAR III -- and the feature of concern to CBS in this review proceeding -- is the creation of exceptions from the three-hour limitation on network and off-network programming for "programs designed for children, public affairs programs or documentary programs."[14/] In undertaking the revision of the rule now under review, the Commission has not abandoned its earlier, and plainly suspect, waiver policy. Rather, the Commission has

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(Footnote continued from page 13)

> "The waiver seems to be based substantially upon a conclusion that this series is 'distinctive and meritorious' and 'of obviously distinctive character and merit.'
>
> "I think the Commission should avoid getting itself involved in characterizing programming as good, bad or indifferent." 35 F.C.C.2d at 775.

14/ CBS limits itself to this particularly objectionable feature of PTAR III. It should be noted, however, that PTAR III has also modified PTAR I so as to permit regular half-hour network news programs when immediately adjacent to a full hour of local news or public affairs programming, certain sports runovers and other special events, and its application to feature films extends to those that have previously appeared on a newtwork at any time.

simply affirmed that approach and codified it in the rule.[15/]

In the Second Report and Order the Commission has made clear that the basis for the exceptions for certain kinds of programs is the Commission's own subjective view of what programming should be broadcast. Thus, it stated:

15/ PTAR III was preceded by an earlier revision of the rule, PTAR II, which was adopted in January 1974, but which never became effective and whose merits were never passed upon judicially. See Prime Time Access Rule, 44 F.C.C.2d 1081 (1974); NAITPD v. FCC, 502 F.2d 249 (2d Cir. 1974). While it is unnecessary to delineate the precise features of PTAR II and their differences from PTAR I and III, it should be noted that PTAR II also contained exemptions (limited to only one half-hour per week) for children's, public affairs, and documentary programs.

The order promulgating PTAR II is chiefly significant here for the articulation of a justification for the exemptions which, as we show, is completely without basis in law. There, with respect to the objection that the exceptions constitute an impermissible "quality judgment" by the Commission, the Commission stated:

> "Bearing in mind the limited scope of the action taken - that it is permissive, not a requirement, and that it relates to only a half hour a week - we do not conceive these objections to have merit." 44 F.C.C.2d at 1134.

This statement -- that the exceptions are "permissive" -- is no answer to the charge, which the Commission did not deny, that the rule was based on "quality judgments" as to which programs were "worthwhile." See 44 F.C.C.2d at 1134. Clearly the Commission can dictate the content of programming with equal facility by exceptions from broad prohibitions as by particular prohibitions.

> "We find that the prime time access rule has had the effect of inhibiting certain kinds of programming which we believe are entitled to special treatment so as to encourage their timely presentation in prime time." (Emphasis supplied.) Second Report and Order, ¶ 29.

With respect to certain specific documentaries, the Commission stated:

> "In our January 1974 decision we noted the value of these programs . . . . We are still of the same view." (Emphasis supplied.) Second Report and Order, ¶ 33.

However, apparently on the basis of its judgment that certain kinds of "documentary programs" were less valuable than others, the Commission added a proviso that documentaries dealing with "the visual entertainment arts (stage, motion pictures or television) where more than 50% of the program is devoted to the presentation of entertainment material itself" would not qualify under the exception.[16/]

That PTAR III in fact represents the Commission's own subjective program judgments is reflected not only in the Second Report and Order, but also by Commissioner Robinson's dissenting opinion. Commissioner

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16/ The Commission justified this proviso as closing a possible "loophole" in the exception, although it did not attempt to explain how documentaries dealing with the visual arts might differ from certain documentaries dealing with animals in terms of their "entertainment" characteristics. Second Report and Order, ¶ 28, n.23.

Robinson illuminated the First Amendment concern generated by the Commission's approach to favoring some kinds of programs:

> "I note the seeming contradiction between the Commission's statement, on the one hand, that it is unable to make a judgment on the quality of game shows and other access programs, and on the other hand its creation of an exemption for 'public affairs,' 'documentaries' and 'children's programs.' This paradox simply mirrors and carries forward a larger paradox: the tension between the Commission's expressed concern that we not allow our own programming preferences to dictate the nature of the rule, as contrasted with the obvious fact that having the rule in the first place substitutes our choice for public choice in television programming." Second Report and Order, Dissenting Statement of Commissioner Glen O. Robinson, p. 24, n.

The Second Report and Order also makes clear that, in codifying the exceptions for program types previously granted on an ad hoc basis, the Commission will continue to pass upon the merits of particular programs on an individual basis and, in addition, will now closely scrutinize licensee program judgments to ensure that such judgments conform to the Commission's judgment of what programs should be broadcast. Thus, the Second Report and Order discusses the merits or "value," in the Commission's view, of specific programs such as "National

Geographic," "Jacques Cousteau" and the "America" series. (See Second Report and Order, ¶ 33; see also ¶¶ 30, 31 (n.25).) And, more important, in sharp contrast to its announced administrative policies under the fairness doctrine, which emphasize licensee discretion and freedom from close administrative supervision,[17/] the Second Report and Order repeatedly warns broadcasters that their programming performance under the rule will be carefully scrutinized by the Commission. With respect to children's programming, the Commission pointedly cautioned:

> "It is our expectation that networks and licensees will not abuse this exception to the rule, particularly in access-period use of network or off-network programs which, while having some appeal to children, were or are not primarily designed for them but for viewing by adults, or adults and children, and for presentation of normal commercial advertising addressed to adults." Second Report and Order, ¶ 31.

More broadly, with respect to the exceptions generally, the Commission made the following remarkable statement:

> "We expect the networks, and licensees in their acceptance of network programs and use of off-network material, to keep such programming to the minimum consistent with their programming judgments as to what will best serve the

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17/ See discussion, infra, pp. 33-34.

> interests of the public generally. 29/ . . . We caution networks to avoid any incursion into [Saturday "access" time] unless there are compelling public interests for so doing. If there are extensive deviations from these precepts, the exemptions may have to be re-visited.

29/ Thus, the stripping of off-network material on the theory that it is a program designed for children or a documentary program, would not be regarded as consistent with the spirit or objectives of the rule." Second Report and Order, ¶ 34. See also ¶ 64.

While the Second Report and Order is replete with stern admonitions concerning licensee restraint, neither the rule nor the report provides meaningful guidelines to the licensee. Thus, while the Commission expressly singled out only one program from among all current prime time network offerings -- "Wonderful World of Disney" -- as falling within its category of "programs primarily designed for children" and strongly suggested that certain syndicated programs would not so qualify, 18/ it offered no explanations for its seemingly arbitrary

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18/ The Commission stated: "A small number of syndicated programs (current or in earlier years under the rule) might also fall into this category, although we would not necessarily regard all programs so considered by some as falling within the scope of this exemption." Second Report and Order, ¶ 30.

distinctions.[19/] Nor did it amplify the meaning of "programs designed primarily for children aged 2 through 12" or explain the parameters of its phrase "extensive deviations from these precepts."

Presumably, a broadcaster has two choices under the rule. Either a broadcaster makes his own judgments about the scope of the exceptions and faces sanctions for violation of the Commission's rule, including criminal

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19/ According to the Nielsen Audience Demographic Report for October 28 through November 24, 1974, the share of the available children's audience (ages 2 through 11) attracted to the "Wonderful World of Disney" was smaller than the share attracted to three other network prime time programs. In terms of program "ratings" -- total number of viewers -- among children, "Disney" ranked below one other program, and was not significantly above several others. Moreover, with respect to one of the criteria set forth by the Commission for distinguishing children's programming -- whether the advertising on it is directed to adults (see Second Report and Order, ¶ 31) -- our survey of the commercial advertising on "Disney" during the fourth quarter of 1974 indicates that approximately 27% of the commercials were for adult-oriented products (automobiles, appliances, proprietary medications and vitamins, etc.), as opposed to 26% for child-oriented products (games, toys, etc.) and 47% for products in whose purchase both may play a role (food, toothpaste, etc.). In fact, in its promotional material, NBC has characterized "Disney" as family entertainment, not children's programming. (Indeed, if it were considered children's programming, NBC might have run afoul of the Code of the National Association of Broadcasters, which expressly prohibits the advertising of proprietary medicines and vitamins in programs designed primarily for children.) In short, the Commission's conclusion seems to be based more on its own elitist view of what children desire to watch -- or should watch -- rather than on the actual program preferences of children and adults and the programming judgments of broadcasters.

and civil penalties and possible license revocation,[20] if the Commission subsequently disagrees. Or to avoid these risks, the broadcaster must seek some sort of advisory Commission opinion before presenting his program.

In sum, the scope and effect of PTAR III represents an unwarranted effort by the Commission to regulate and promote types of programs according to their content and the Commission's impressions of their value to the public. Moreover -- in view of the absence of meaningful standards, the arbitrary judgments reflected in the Second Report and Order, the vigilant supervisory role the Commission has announced for itself, and the denial of licensee discretion -- PTAR III establishes an even more pervasive system of program licensing than emerged from the waiver rulings under the original rule. As we proceed to show, the Commission's regulatory scheme is in plain contravention of the First Amendment and the strictures of the Communications Act.[21]

20/ See 47 U.S.C. §§ 312, 502, 503.

21/ We are, of course, not addressing in this brief the merits of the kinds of programming which the Commission has sought to favor. Thus, for example, CBS has always believed that children's programming is important, and accordingly it has continually offered substantial amounts of such programming to its affiliates and has broadcast such programming on its own stations.

II. The Commission's Action Violates The First Amendment.

Analysis of the regulatory scheme under review must begin with the well established principle that governmental regulation on the basis of the content of speech is presumptively invalid under the First Amendment. Thus, in Police Department of the City of Chicago v. Mosley, 408 U.S. 92 (1972), the Supreme Court held invalid an ordinance prohibiting all picketing in the vicinity of a school except picketing related to labor disputes with the school. The Court said:

> "The operative distinction [in the ordinance] is the message on a picket sign. But, above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content . . . . The essence of . . . forbidden censorship is content control. . . .
>
> ". . . Selective exclusions from a public forum may not be based on content alone, and may not be justified by reference to content alone." 408 U.S. at 96-97.22/

22/ See also, e.g., Grayned v. City of Rockford, 408 U.S. 104 (1972); Shuttlesworth v. Birmingham, 394 U.S. 147 (1969); Tinker v. Des Moines School District, 393 U.S. 503 (1969); Adderly v. Florida, 385 U.S. 39 (1966); Fowler v. Rhode Island, 345 U.S. 67 (1953); Niemotko v. Maryland, 340 U.S. 268 (1951); Women Strike For Peace v. Morton, 472 F.2d 1273 (D.C. Cir. 1972).

Moreover, as we have noted above, Police Department of the City of Chicago, and the other cited authorities demonstrate that a regulation based on content cannot be justified because it is framed in terms of an exception from otherwise valid regulatory requirements. Thus, in Police Department of the City of Chicago, while the Court recognized that all picketing may be reasonably restrained in terms of time, place and manner, it held that when exceptions are drawn on the basis of subject matter,

> "the regulation 'thus slip[s] from the neutrality of time, place, and circumstance into a concern about content.' This is never permitted." 408 U.S. at 99.23/

It has been held, of course, that broadcasting presents somewhat different considerations from other media with respect to the validity of regulation under the First Amendment and that the Commission is not entirely precluded from considering overall programming in the exercise of its functions. Thus, the Commission has been held to have general authority to consider the overall programming promises or performance of licensees for purposes of

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23/ Quoting Kalven, The Concept of a Public Forum, 1965 Sup. Ct. Rev. 29.

license grant or renewal.[24/] In addition, the fairness doctrine requires licensees to devote a reasonable amount of time to the discussion of controversial issues of public importance and to provide a reasonable opportunity for the presentation of contrasting viewpoints on those

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24/ See, e.g., Johnston Broadcasting Co. v. FCC, 175 F.2d 351, 359 (D.C. Cir. 1949). As part of this authority, two cases have held that the Commission is required by the Communications Act to consider whether a proposed changes in program format will deprive a significant segment of the community of a unique type of programming before approving an assignment of license. See Citizens Committee to Save WEFM v. FCC, 506 F 2d 246, on rehearing, 252 (D.C. Cir. 1974); Citizens Committee to Preserve the Voice of the Arts in Atlanta v. FCC, 436 F.2d 263 (D.C. Cir. 1970). Even in that context, the Commission's authority has generated considerable controversy and has been viewed as raising substantial constitutional questions. For example, Judge Bazelon, concurring, expressed the view that except in comparative licensing situations, he could perceive

> "no rationale for anything a) approaching a requirement that the licensee air certain political views or artistic achievement or b) approaching a possible denial of a license on that basis. Such requirements would in any other context directly contravene freedom of the press and cannot be justified by the nature of telecommunications." 506 F.2d at 278.

And Judge MacKinnon, dissenting, also expressed concern:

> "The majority opinion indicates that we are beginning to open the door wider for intrusion of the courts and the Government into the content of radio broadcasts. To my mind such governmental interference should be held to a minimum and the power should not be exercised except upon the clearest grounds." 506 F.2d at 285.

issues. The general fairness doctrine has also been held constitutional. Red Lion Broadcasting Company, supra. And this Court in Mt. Mansfield, supra, held that limited regulation as to the source of station programming was valid under the First Amendment.

It is equally well established, however, that the First Amendment does apply to broadcasting and bars the Commission from performing the role of broadcast censor or from intruding into the decisions of broadcasters based on the Commission's views as to appropriate program content. In Red Lion Broadcasting, supra, the Supreme Court, in upholding the Commission's general fairness doctrine, indicated that the Commission did not have

> "a free hand to vindicate its own idiosyncratic conception of the public interest or of the requirements of free speech." 395 U.S. at 395.

Indeed, the Court went on to draw a distinction particularly relevant here:

> "We need not and do not now ratify every past and future decision by the FCC with regard to programming. There is no question here of the Commission's refusal to permit the broadcaster to carry a particular program or to publish his own views . . . . Such questions would raise more serious First Amendment issues." 395 U.S. at 396.25/

25/ See also Columbia Broadcasting System, Inc. v. Democratic National Committee, 412 U.S. 94 (1973); St. Amant v. Thompson, 390 U.S. 727 (1968); United States v. Paramount Pictures, Inc., 334 U.S. 131, 166 (1948).

The same point was made by this Court in Mt. Mansfield when it said of PTAR I:

> "The Commission does not dictate to the networks or the licensees . . . what they may broadcast or what they may not broadcast . . . . " 442 F.2d at 480.26/

In short, as the Commission has recognized, for it to regulate

> "upon its own subjective determination of what is or is not a good program . . . would 'lay a forbidden burden upon the exercise of liberty protected by the Constitution.'"27/ (Citing Cantwell v. Connecticut, 310 U.S. 296, 307 (1940).)

26/ Even where the Commission has been held to have authority to consider general program formats in connection with renewals and assignment applications, the courts have stressed that its authority does not extend to determining format on the basis of its own view of the public interest or the "value" of programs:

> "The Commission is not dictating tastes when it seeks to discover what they presently are, and to consider what assignment of channels is feasible and fair in terms of their gratification." Citizens Committee to Preserve the Voice of the Arts in Atlanta, supra, 436 F.2d 263, 272, n.7 (D.C. Cir. 1970).

In contrast, the Second Report and Order makes clear that the exemptions are adopted on the basis of types of programs which "we believe" will serve the public interest, and have "value". (¶¶ 29,33.) And, as we have shown, its arbitrary distinctions among programs are clearly not based on an objective assessment of the interests and desires of the viewing audience. See n.19/, infra.

27/ Report and Statement of Policy Re: Network Programming Inquiry, 25 Fed. Reg. 7291, 7293 (1960).

The scheme of PTAR III clearly involves such forbidden regulation of program content. Moreover, the Commission in the Second Report and Order and in its prior waiver practices has involved itself in the intimate supervision of the day-to-day activities and judgments of broadcasters -- a role inimical to basic First Amendment rights.[28/] It was for this very reason that the Supreme Court in Columbia Broadcasting System v. DNC, 412 U.S. 94 (1973), rejected a right-of-access system. Such a system, the Court said would present a

> "problem of critical importance to broadcast regulation and the First Amendment -- the risk of an enlargement of Government control over the content of broadcast discussion of public issues. See, e.g., Fowler v. Rhode Island, 345 U.S. 67 (1953); Niemotko v. Maryland, 340 U.S. 268 (1951) . . . . "

> "Under a . . . Government supervised right-of-access system . . . the Commission would be required to oversee far more of the day-to-day operations of broadcasters' conduct . . . .

> ". . . The Commission's responsibilities under a right-of-access system would tend to draw it into a continuing case-by-case determination of who

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28/ In view of the manifest intention of the Commission to become so involved in licensees' programming judgments, this Court need not reach the question whether the Commission could constitutionally adopt narrowly confined exceptions from the prime time access rule based on categories of program content.

should be heard and when . . . . "
412 U.S. at 126-27.29/

Regulation based on the content of speech is particularly invidious where, as here, the standards in the regulation are imprecise and subject to discretionary application by the governing agency.30/ In Interstate Circuit, Inc. v. Dallas, 390 U.S. 676 (1968), the Supreme Court struck down an ordinance providing for the reviewing of films by a Motion Picture Classification Board and requiring that the exhibition appropriately advertise those deemed by the Board to be "not suitable for young persons." Although the ordinance undertook to define at some length the term "not suitable for young

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29/ It is significant, moreover, that in rejecting a right-of-access system, the Court refused to distinguish between access claimants on the basis of an alleged special public interest in certain kinds of broadcasts. The Court said:

> "DNC has urged in this Court that we at least recognize a right of our national parties to purchase air time for the purpose of discussing public issues. We see no principled means under the First Amendment of favoring access by organized political parties over other groups or individuals." Columbia Broadcasting System, Inc., supra, 412 U.S. at 127, n.21.

30/ See, e.g., Grayned v. City of Rockford, 408 U.S. 104, 108-09 (1972); Coates v. City of Cincinnati, 402 U.S. 611, 615-16 (1971); Niemotko v. Maryland, 340 U.S. 268, 271-72 (1951).

persons," the Court held that the system provided inadequate limitations on the Board's discretion and constituted "nothing less than a roving commission." 31/ 390 U.S. at 688 (citing Kingsley International Pictures Corp. v. Regents, 360 U.S. 684, 701 (Clark, J. concurring)). Moreover, while the regulation did not undertake directly to restrain exhibition of films, the Court said:

> "Vagueness and the attendant evils . . . are not rendered less objectionable because the regulation of expression is one of classification rather than direct suppression." 390 U.S. at 688. 32/

The identical vice inheres in the Commission's Second Report and Order here under review. Indeed, the language of the part of that order excepting "children's programs" is nearly identical to the standard held in-

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31/ The Court also rejected the argument that the regulatory system was justified by special considerations relating to the state's interest in children. The Court said:

> "Nor is it an answer to an argument that a particular regulation of expression is vague to say that it was adopted for the salutory purpose of protecting children. The permissible extent of vagueness is not directly proportional to, or a function of, the extent of the power to regulate or control expression with respect to children." 390 U.S. at 689.

32/ See also, Teitel Film Corp. v. Cusack, 390 U.S. 139 (1968); Freedman v. Maryland, 380 U.S. 51 (1965); Bantam Books, Inc. v. Sullivan, 372 U.S. 58 (1963).

valid in Interstate Circuit. Moreover, the regulatory system adopted in the Second Report and Order provides even less meaningful guidelines to the licensee than the systems condemned in Interstate Circuit and other cases. The Commission has engaged to decide such questions as whether particular programs "while having some appeal for children, . . . are not primarily designed for them"; whether advertising in a program is "addressed to adults"; whether particular programs have adequate informational content to satisfy "an important purpose of the rule," and whether the total amount of programming exceeds the "minimum" to which broadcasters are expected to adhere. In so doing, the Commission has adopted a regulatory system in which

> "individual impressions become the yardstick of action, and result in regulation in accordance with the beliefs of the individual censor rather than regulation by law." Kingsley International Pictures, supra, 360 U.S. at 701 (Clark, J., concurring).

It is clearly of no consequence that the Commission's regulation does not provide by its terms for formal agency review of programs prior to their exhibition or operate directly to suppress disfavored programs. Thus, in Bantam Books, Inc. v. Sullivan, supra, the Supreme Court struck down a system which did not require the

submission of material to a reviewing board prior to sale and which did not provide the board with any prosecutorial or suppressive functions, but which merely authorized the board to notify booksellers that their material appeared objectionable and to "exhort" them to "cooperate" with the Board's efforts "to encourage morality in youth." Far from saving the regulatory scheme, the Court held that its informal sanctions had a

> "capacity for the suppression of constitutionally protected publications . . . far in excess of the typical licensing scheme held constitutionally invalid by this Court. . . ." 372 U.S. at 71.

With respect to PTAR III, not only are there civil and criminal penalties for violations of the Commission's rules,[33/] but, perhaps more importantly, every licensee is well aware that the Commission has ultimate authority to revoke its license. Under these circumstances, when the Commission states that it "expects" certain conduct, and "cautions" against infractions of the "spirit" of its rules, few licensees will assume the risk of incurring the Commission's

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33/ 47 U.S.C. §§ 502, 503.

disfavor.[34/]

Thus, tested by traditional First Amendment standards, it is clear that the Commission's action here must fall. Sensitive to First Amendment values, decisions which have sustained Commission regulations relating to the programming area have repeatedly emphasized the necessity of preserving the widest degree of licensee discretion with respect to program selection and thus minimizing the Commission's intrusion into the broadcast judgments. No such deference to licensee judgments appears in the Second Report and Order adopting PTAR III. Quite the contrary. As noted above, the Commission has made unmistakably clear that little deference, or none at all, is to be paid to broadcasters' good faith interpretation of the rule or of their public interest obligations.

In contrast to the approach evident in PTAR III, the courts and the Commission in the application

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34/ The courts have recognized the inhibiting effect of Commission oversight of licensees. With reference to the administration of the fairness doctrine, the court in National Broadcasting Company, Inc. v. FCC, ___ F.2d ___ (D.C. Cir. No. 73-2256, September 27, 1974), rehearing en banc granted, December 13, 1974), observed:

> "The spectre of renewal jeopardy for failure to comply fully with the fairness doctrine can have a serious inhibiting effect . . . ." (Slip op. at 26, n.57.)

of the fairness doctrine have consistently stressed deference to licensee discretion and restraint on Commission intrusion.

> "Thus, in opinion after opinion, the Commission and the courts have stressed the wide degree of discretion available under the fairness doctrine . . . ." Democratic National Committee v. FCC, 460 F.2d 891, 900 (D.C. Cir.), cert. denied, 409 U.S. 843 (1972). 35/

The Commission's failure to follow that same approach here plainly requires invalidation of the Commission action. As the District of Columbia Circuit has observed in holding invalid undue Commission intrusion into license judgments under the fairness doctrine:

35/ See also, e.g., Columbia Broadcasting System, Inc. v. Democratic National Committee, 412 U.S. 94 (1973); Brandywine Main-Line Radio, Inc. v. FCC, 473 F.2d 16, 44 (D.C. Cir. 1972), cert. denied, 412 U.S. 922 (1973). Green v. FCC, 447 F.2d 323 (D.C. Cir. 1971); Fairness Report, 48 F.C.C.2d 1 (1974); Fairness Primer, 40 F.C.C. 598 (1964).

Moreover, application of the fairness doctrine has involved, almost without exception, the question of whether contrasting sides of a public issue already treated by a licensee in his broadcasts have been, or should be presented, and has not involved the question of whether a licensee has adequately treated particular issues or public issues generally. With respect to the latter question, the Commission has recently stressed that the doctrine leaves to the licensees the decision of which public issues to address in its programming, with the "rare exception" involving "some issues [which] are so critical or of such great public importance that it would be unreasonable for the licensee to ignore them completely." Otherwise, the Commission noted that it would become too closely involved in the process of deciding what programming the public interest required. Fairness Report, supra, at 10 (1974). See also Complaint of Public Communication, Inc., F.C.C. 74-1367 (December 10, 1974).

> "The First Amendment is broadly staked on the view that our country and our people - rich in diversity and viewpoint - is best served by widest latitude to the press . . . that is subject only to minimum controls necessary for the vitality of our democratic society."

Where, as here, the regulatory system serves directly to deprive licensees of discretion in program selection, the Commission has clearly not provided the "widest latitude" - or, as the Supreme Court has repeatedly stated - the "breathing space" necessary for First Amendment liberties to survive. NAACP v. Button, 371 U.S. 415, 433 (1963). National Broadcasting Company, Inc. v. FCC, ___ F.2d ___ (D.C. Cir. No. 73-2256, September 27, 1974, rehearing en banc granted, December 13, 1974).

III. PTAR III Involves A Commission Intrusion Into Program Content Which Is Plainly Prohibited By The Communications Act.

Even if the Commission's action in the Second Report and Order were less clearly invalid under the First Amendment, the existence of substantial constitutional doubts as to the validity of the Commission's action would require the Communications Act to be construed to avoid those questions.[36/] Such a construction is plainly consistent with the Congressional intent. Indeed, the legislative history and language of the Communications Act, particularly Section 326 (47 U.S.C. § 326), barring Commission censorship, show that the Commission's action in the Second Report and Order is not authorized by the Act.

Congress's intent to prohibit the Commission from controlling the content of programming and to insure licensee discretion in the selection of programming extends back to the origins of the Radio Act in 1927. It was understood at the time of the 1927 Act that the newly created Federal Radio Commission would be forced to choose among applicants on some basis and determine who would be permitted to obtain broadcast licenses. Congress contemplated that the Commission could consider overall licensee programming in selecting among applicants

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36/ See United States v. Rumely, 345 U.S. 41, 45 (1953).

for broadcast channels. But Congress reached a different conclusion on the separate and critical question as to whether the Commission should be permitted to control the licensee's exercise of discretion in selection of program content. Although certain Congressmen expressed concern that there were dangers in allowing broadcasters to exercise program judgment, Congress decided there were even greater dangers in restricting this discretion, or in allowing the Commission to restrict it. Accordingly, the Congress enacted the anti-censorship provision of the Radio Act (now Section 326).

Even before the anti-censorship provision was added to the bill which became the Radio Act of 1927, it was generally agreed that the Commission was to have no power to prescribe the content of individual programs under the general public interest, convenience and necessity standard, and that the Commission was intended to have "no power at all" to interfere with broadcasters' "freedom of speech."[37/] The Congressional restrictions

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37/ Congressman LaGuardia expressed concern as to whether the bill contained an adequate safeguard against censorship by the Commission. Congressman White replied that the bill did not specifically deal with this issue but that, in view of the First Amendment, "The pending bill gives the Secretary [of Commerce] no power of interfering with freedom of speech in any degree." Congressman Laguardia then stated:

(Footnote continued on page 37)

on Commission censorship did not reflect merely a devotion to an abstract principle. Various proposals to restrict licensee discretion in program selection were proposed and rejected, with proponents arguing that some control over "arbitrary and tyrannical action" (67 Cong. Rec. 5483 (1926)) was required, while opponents of such proposals pointed out that they would confer a censorship power on the Commission. See, e.g., Hearings on H.R. 5589 Before the House Committee on the Merchant Marine and Fisheries, 69th Cong., 1st Sess. (1926), p. 26. Thus, for example, Congress considered a proposal that, whenever the licensee of a station broadcast the discussion of any question affecting the public interest, his station should be deemed a common carrier and be compelled to afford access to his station for time to reply.[38/] This proposal went so far as to allow the Commission to regulate the amount of time for reply to be afforded and the method for

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(Footnote continued from page 36)

> "It is the belief of the gentleman and the intent of Congress in passing this bill not to give the Secretary any power whatever in that respect in considering a license or the revocation of a license."

Ccngressman White replied: "No power at all." 67 Cong. Rec. 5480 (1926).

38/ S. Rep. No. 772, 69th Cong., 1st Sess. (1926), p. 4; 67 Cong. Rec. 12503 (1926).

selecting appropriate spokesmen. This proposal was successfully opposed on the floor of the Senate because it was feared it would deprive licensees of appropriate discretion in the selection of broadcasts. 67 Cong. Rec. 12504 (1926).

With respect to concern expressed on the House floor during debates on the conference report that the bill did not provide for sufficient control of "private censorship," the floor manager of the conference report responded:

> "Yes; and you are trespassing very closely on sacred ground when you attempt to control the right of free speech. It has become axiomatic to allow the freedom of the press, and when Congress attempts by indirection to coerce and place a supervision over the right of a man to say from a radio station what he believes to be just and proper, I think Congress is trespassing upon a very sacred principle." 68 Cong. Rec. 2567 (1927).

Of particular significance here, Congress specifically rejected a proposal to control programming discretion by authorizing the Commission to establish a system of priorities for the selection of programming by broadcasters, under which, e.g., religious programs would have preference over educational programs, educational programs over entertainment programs, etc. The proposal

was dropped because it was viewed as conferring a power "akin to that of censorship."[39/]

As the Supreme Court had recognized, the basic provisions of the 1927 Act were not altered in the Communications Act of 1934.[40/] In FCC v. Sanders Bros. Radio Station, 309 U.S. 470, 475 (1940), the Court stated that "[t]he Commission is given no supervisory control of . . . programs." And in McIntire v. William Penn Broadcasting Co., 151 F.2d 597, 599 (3d Cir. 1945), cert. denied, 327 U.S. 779 (1946), the court held that it is "clear from history and the interpretation of the Federal Communications Act that the choice of programs rests with broadcasting stations licensed by the FCC."

The Communications Act's prohibitions against program content control have been most recently affirmed by the Supreme Court in Columbia Broadcasting System, Inc. There, after carefully reviewing the legislative history of the Act, the Court stated:

39/ Congressman White had incorporated a provision giving this power to the Commission in a previous bill (H.R. 7357, 68th Cong., 1st Sess. (1924)), which provided the Secretary of Commerce with the power to "prescribe the nature of the service to be rendered and the priorities as to subject matter to be observed by each class of licensed station . . . ." In hearings on the bill that ultimately became the Radio Act, he stated that he had deleted this provision because so many had expressed the fear that this power to interfere with licensee program selection was "akin to that of censorship." Hearings on H.R. 5589, supra, pp. 39-40.

40/ FCC v. Pottsville Broadcasting Co., 309 U.S. 134, 137 (1940).

> "Congress appears to have concluded . . . that of these two choices - private or official censorship - Government censorship would be the most pervasive, the most self-serving, the most difficult to restrain and hence the one most to be avoided.
>
> ". . . Congress intended to permit private broadcasting to develop with the widest journalistic freedom consistent with its public obligations." 412 U.S. at 105, 110.

And as Justice Stewart said, concurring:

> "[I]f [First Amendment] 'values' mean anything, they should mean at least this: If we must choose whether editorial decisions are to be made in the free judgment of individual broadcasters, or imposed by bureaucratic fiat, the choice must be for freedom." 412 U.S. at 146.

In sum, the system of preferred programming reflected in PTAR III, together with the pervasive intrusion of the Commission into the operations of broadcasters, plainly exceeds the authority which Congress conferred.

CONCLUSION

For the foregoing reasons, the Commission Order under review should be reversed.

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February 21, 1975

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